Supreme Court, U. S.
FILED
SEP 21 1976
MICHAEL RODAK, JR., CLERK

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1301

DELAWARE TRIBAL BUSINESS COMMITTEE, *et al.*, *Appellants*,

VERSUS

WANDA JUNE WEEKS, *Appellee*.

No. 75-1335

ABSENTEE DELAWARE TRIBE OF OKLAHOMA BUSINESS COMMITTEE, *et al.*, *Appellants*,

VERSUS

WANDA JUNE WEEKS, *et al.*, *Appellees*.

No. 75-1495

THOMAS S. KLEPPE, SECRETARY OF THE INTERIOR, *et al.*, *Appellants*,

VERSUS

WANDA JUNE WEEKS, *et al.*, *Appellees*.

Appeals from the United States District Court For the Western District of Oklahoma

BRIEF FOR APPELLEES

DELMER L. STAGNER
STEPHEN P. FRIOT
Counsel for Appellees

of Counsel:
SPRADLING, STAGNER, ALPERN & FRIOT
Suite 700, Continental Savings Building
101 Park Avenue
Oklahoma City, Oklahoma 73102
HENRY B. TALIAFERRO, JR.
CASEY, LANE & MITTENDORF
815 Connecticut Avenue N.W.
Washington, D.C. 20006

September, 1976

UTTENBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. 235-0030

TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of the Case	3
History of the Indians Claims Commission Litigation	12
Litigation in the District Court	16
Additions to Statement	18
A. Treaties	18
1854 Treaty between the United States and the Delaware Tribe of Indians (10 Stat. 1018)	18
1860 Treaty between the United States and the Delaware Tribe of Indians (12 Stat. 1129)	18
1866 Treaty between the United States and the Delaware Tribe of Indians (14 Stat. 793)	19
B. Status of Cherokee and Absentee Delawares and Relation of Kansas Delawares to such groups	21
Summary of Argument	28
Argument	31
I. The District Court properly reached the merits of these cases	31
A. Public Law 92-456 (25 U.S.C. §§ 1291-97) providing for the distribution of previously appropriated Indian Claims Commission judgment funds to two statutorily defined classes of fully emancipated, non-ward, non-reservation recipients, without regard to tribal membership or relationship to any existing tribe, is not immunized by the po-	

TABLE OF CONTENTS CONTINUED PAGE

litical question doctrine of Lone Wolf v. Hitchcock, 187 U.S. 553, from constitutional review 31

B. The delegated plenary powers of the executive department may not be arbitrarily exercised to extend recognition as an existing tribe to the fully emancipated and assimilated non-ward lineal descendants of members of the historical Delaware Nation for the purpose of ascribing specially protected constitutional status to legislation affecting that group, where the commonly accepted factual basis for such recognition do not exist 34

C. Assuming, arguendo, that the issue of membership in an Indian tribe, as presented by the Appellants, is a material issue in these appeals, Congress did not statutorily define the membership of Indian tribes by Public Law 92-456 (25 U.S.C. §§ 1291-97) 38

D. This action was a proper rule 23(b)(1)(B) and 23(b)(2) class action. All parties in the District Court stipulated that the action could proceed as a class action. The two alleged tribal groups voluntarily intervened in the action and any sovereign immunity which either of such tribal groups may have had is immaterial 41

II. Public Law 92-456 (25 U.S.C. §§ 1291-99) is void for violation of the due process clause of the Fifth Amendment in that said statute, designating a class of persons to receive Indian Claims Commission judgment funds on a per capita basis, which funds had theretofore been appropriated to satisfy a judgment compensating for a wrong to the historical Delaware Tribe,

TABLE OF CONTENTS CONTINUED PAGE

excludes and invidiously discriminates against a class of persons, the Kansas Delaware class, which stands on an equal footing with the benefited classes 43

A. The legislative purpose to be served by the enactment of the challenged statute was to provide a plan for the distribution of the Indian Claims Commission Dockets 72 and 298 funds to the present representatives of the persons who were wronged in 1854 43

B. In view of the legislative purpose for which the Congress enacted the statute in question, the District Court correctly determined that the challenged statute embodies an invidious discrimination in violation of the due process clause of the Fifth Amendment 47

C. Assuming, arguendo, that the issue of "expatriation," as presented by the Appellants, is a material issue in these appeals, the statutory grant of citizenship to the Kansas Delawares who were minors in 1867 did not result in an "expatriation" of such minors 55

III. When the adult Kansas Delawares resigned from the tribe in 1866 on the express condition that they would be entitled to receive their pro-rata share of the tribal trust fund, their interest in such fund, including any additions thereto for wrongs prior to 1866, became individualized and is a property right which is protected against uncompensated taking by the just compensation clause of the Fifth Amendment 56

Issues Not Presented by These Appeals 59

Conclusion 62

Certificate of Service follows Brief.

TABLE OF AUTHORITIES

STATUTES AND TREATIES: PAGE

25 U.S.C. § 163 ... 40
25 U.S.C. § 177, 1 Stat. 137 ... 37
25 U.S.C. § 601 ... 52
25 U.S.C. § 967(a) ... 52
25 U.S.C. § 1011 ... 52
25 U.S.C. § 1101 ... 52
25 U.S.C. § 1131 ... 52
25 U.S.C. § 1151 ... 52
25 U.S.C. §§ 1181-86, Public Law 90-508 ... 12, 24,39, 51, 52
25 U.S.C. § 1232 ... 52
25 U.S.C. §§ 1291-97 Public Law 92-456 ... 2, 10, 14, 17, 25 26, 27, 38, 39, 40
25 U.S.C. § 1301 ... 35, 41
43 U.S.C. § 189, 18 Stat. 402 ... 8
Treaty of October 3, 1818, 7 Stat. 188 ... 3, 12
Supplemental Article to Treaty of 1818, 7 Stat. 327 ... 3
1854 Treaty, 10 Stat. 1018 ... 18
1860 Treaty, 12 Stat. 1129 ... 18
Treaty of July 4, 1866, 14 Stat. 793 ... 5, 6, 7, 19, 49
Act of June 22, 1874, ch. 389, 18 Stat. 146 ... 49
Act of July 1, 1902, ch. 1375, § 68, 32 Stat. 716 ... 10
Act of April 21, 1904, 33 Stat. 222 ... 11, 21
Wheeler-Howard Act of 1934, 48 Stat. 984 ... 37

CASES:

Absentee Delaware Tribe of Oklahoma v. United States, 9 Ind.Cl.Comm. 346 (1961) ... 12
Baciarelli v. Morton, 481 F.2d 610 (9th Cir. 1973) ... 40
Baker v. Carr, 369 U.S. 186 ... 27, 32, 34-35, 38, 45
Big Eagle v. United States, 323 F.Supp. 60 ... 57

TABLE OF CONTENTS CONTINUED

PAGE

Carrington v. Rash, 380 U.S. 89 ... 53
Cherokee Nation v. Journeycake, 155 U.S. 196 ... 7, 8, 35
Choate v. Trapp, 224 U.S. 665 ... 33, 57, 59
Dandridge v. Williams, 397 U.S. 471 ... 57
Davis v. Littell, 398 F.2d 83 (C.A. 9th 1968), cert. den. 393 U.S. 1018 (1968) ... 36
Delaware Indians v Cherokee Nation, 193 U.S. 127 ... 7, 35
Delaware Tribe of Indians v. United States, 2 Ind. Cl.Comm. 253 (1952), aff'd 128 F.Supp. 391 (Ct. Cl. 1955) ... 8
Elk v. Wilkins, 112 U.S. 94 ... 55
Fondahn v. Native Village of Tyonek, 450 F.2d 520 (9th Cir. 1971) ... 40
Hallowell v. United States, 221 U.S. 317 ... 55
Helvering v. Gowran, 302 U.S. 238 ... 56
Johnson v. Robison, 415 U.S. 361 ... 35, 47
Joint Tribal Council of Passamaquoddy Tribe v. Morton, 388 F.Supp. 649 (D.C.N.D. Maine), aff'd 528 F.2d 370 (C.A. 1st 1975) ... 37
Jones v. Meehan, 175 U.S. 1 ... 33, 57, 59
Lane v. Pueblo of Santa Rosa, 249 U.S. 110 ... 33, 57, 59
Lone Wolf v. Hitchcock, 187 U.S. 553 ... 31, 32
McDonald v. Board of Election Commissioners, 394 U.S. 802 ... 47
McGhee v. Creek Nation, 122 Ct.Cl. 380, cert. den. 344 U.S. 856 ... 48, 50
Martinez v. Southern Ute Tribe of Southern Ute Reservation, 249 F.2d 915 (10th Cir. 1957), cert. den. 356 U.S. 960 ... 40
Miami Tribe of Oklahoma v. United States, 281 F.2d 202, cert. den. 366 U.S. 924 ... 57, 59
Montoya v. United States, 180 U.S. 261 ... 35
National League of Cities v. Usery, ... U.S. ..., 96 S.Ct. 2465 ... 33

AUTHORITIES CONTINUED PAGE

Perrin v. United States, 232 U.S. 478 37
Powell v. McCormack, 395 U.S. 486 34

Reed v. Reed, 404 U.S. 71 ..... 47, 53
Richardson v. Belcher, 404 U.S. 78 ..... 35, 47
F. S. Royster Guano Co. v. Commonwealth of Virginia, 253 U.S. 412 47

Shoshone Tribe of Indians v. United States, 299 U.S. 476 ..... 33, 57
Sizemore v. Brady, 235 U.S. 441 ..... 33, 57
Stanley v. Illinois, 405 U.S. 645 53

Tee-Hit-Ton Indians v. United States, 348 U.S. 272 33
Tiger v. Western Investment Co., 221 U.S. 286 33
Turtle Mountain Band of Chippewa Indians v. United States, 490 F.2d 935 48

United States v. Creek Nation, 295 U.S. 103 57
United States v. Nice, 241 U.S. 591 55
United States v. Noble, 237 U.S. 74 55
United States v. Powell, 423 U.S. 73 (1975) 57
United States v. Sandoval, 231 U.S. 28 55
United States v. State Tax Commission of Mississippi, 505 F.2d 633 (C.A. 5th 1974) 37
United States Department of Agriculture v. Moreno, 413 U.S. 528 ..... 45, 47

Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 47
Weinberger v. Salfi, 422 U.S. 749 47
Weinberger v. Weisenfeld, 420 U.S. 636 45
Williams v. Johnson, 239 U.S. 414 55
Winston v. Amos, 255 U.S. 373 56

MISCELLANEOUS:

11 Comp.Dec. 496, 501 (1905) 11

House Report No. 1466, December 2, 1945, accompanying Indian Claims Commission Act (25 U.S.C. § 20 et seq.) 1946 U.S. Code Cong. Service 44

25 Op. Atty. Gen. 308, 310 (1904) 11

In the
Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1301

DELAWARE TRIBAL BUSINESS COMMITTEE, *et al.*, *Appellants*,

VERSUS

WANDA JUNE WEEKS, *Appellee*.

No. 75-1335

ABSENTEE DELAWARE TRIBE OF OKLAHOMA BUSINESS COMMITTEE, *et al.*, *Appellants*,

VERSUS

WANDA JUNE WEEKS, *et al.*, *Appellees*.

No. 75-1495

THOMAS S. KLEPPE, SECRETARY OF THE INTERIOR, *et al.*, *Appellants*,

VERSUS

WANDA JUNE WEEKS, *et al.*, *Appellees*.

Appeals from the United States District Court
For the Western District of Oklahoma

BRIEF FOR APPELLEES

PRELIMINARY STATEMENT

This brief is submitted in answer to the briefs of the Appellants in each of the three above numbered appeals. Where there is a reference to the "Secretary," it shall refer

to the Secretary of the Interior, Appellant in Case No. 75-1495. References to the "Cherokee Delawares" refer to the Delaware Tribal Business Committee, et al., Appellants in Case No. 75-1301. Reference to the "Absentees" refer to the Absentee Delaware Tribe of Oklahoma Business Committee, et al., Appellants in Case No. 75-1335. Citations herein to the Jurisdictional Statement (J.S.) shall be to the Statement of the Cherokee Delawares in Case No. 75-1301. References to the "challenged statutes" shall refer to 25 U.S.C. §§ 1291-97 (Pub. Law 92-456). Reference to the "App." shall refer to the joint Appendix filed by all Appellants in the above numbered cases.

In order that this Court may have for its consideration a single Statement of the Case, we have reproduced the statement as contained in the brief of the Cherokee Delawares with such additions thereto shown in italics as the Appellees assert are necessary for an adequate consideration of the issues. Where deletions are made in such statement, a line striking through the portions which the Appellees urge should be deleted will appear. In addition, the Appellees submit a statement, indexed to the record, which relates to the status of the two alleged "tribal" entities. These additions are offered because of the assertion by all Appellants that the funds in dispute belong to such entities and that the challenged statute defined their membership.

The Appellees also submit a separate addition to the Statement of the Case in which the status of the Appellees as descendants of the minor Kansas Delawares as of 1866 is discussed. This is added for the reason that throughout their briefs, the Appellants refer to the Appellees as "ex-

patriates" from the tribe and representatives of "former" members of the Delaware Tribe who resigned as such members.

STATEMENT OF THE CASE

Originally resident on the eastern seaboard of what is now the United States, the Delaware Nation inexorably was driven westward and became geographically scattered by the early 19th century. J.S. App. 6a.[1] The main body of the tribe by this time lived on lands in Indiana and Ohio. Some Delawares, known as the Munsees, had migrated to New York and Canada. Others had crossed the Mississippi River to occupy land granted them in Missouri by Spain and, later, to move south to Arkansas, Texas and Oklahoma. *Id.* Some descendants of these "southern" Delawares eventually settled in western Oklahoma in 1853 and are the ancestors of the modern Absentee Delaware Tribe. J.S. App. 7a-8a.

Through the Treaty of St. Mary's in 1818, 7 Stat. 188, the Delawares ceded their lands in Indiana and Ohio to the United States in exchange for land west of the Mississippi and settled in Missouri where they remained until 1829. J.S. App. 6a-7a. In that year the Delawares signed another treaty, designated as a supplemental article to the Treaty of 1818, whereby the Tribe agreed to accept, as part payment for the Indiana cession, a "permanent" reservation in Kansas. 7 Stat. 327; J.S. App. 7a.

---

[1] J.S. App. references are to the opinions of the District Court which appear in the Appendix to appellants' Jurisdictional Statement in No. 75-1301 at pages 1a-87a.

The Delaware Tribe, on May 6, 1854, entered into another treaty with the United States providing for cession of much of the Tribe's Kansas reservation. 10 Stat. 1048, Attach. 1a. Under Aricle 1 of the Treaty, the Delawares retained certain of their residence lands (the "diminished reserve") as a home, but ceded the remainder (the "trust lands") and the "hunting outlet." 10 Stat. 1048, Attach. 1a-2a; J.S. App. 8a. In Article 2, the United States promised to offer the ceded land for sale at public auction with the proceeds from all sales to be paid to the Delaware general tribal fund. 10 Stat. 1048-49, Attach. 2a-3a; J.S. App. 8a. In 1856 and 1857, however, the United States breached the provisions of Article 2 by selling the trust lands without public auction. J.S. App. 8a. As a result, the Tribe received far less from the sale of their lands than it should have—a fact which resulted in the Indian Claims Commission award in Dockets 72 and 298 and enactment of the distribution statute, 25 U.S.C. §§ 1291-97 (Supp. IV, 1974) the constitutionality of which is the subject of this appeal.

The 1854 Treaty further provided that all proceeds from the land sales in excess of the amount necessary to meet current tribal wants would be paid to "a permanent fund [created] for the benefit of the Delaware people" to be invested by the President of the United States, "the interest to be applied annually for the civilization, education, and religious culture of the Delaware people . . . ." Art. 7, 10 Stat. 1050, Attach. 5a. Moreover, Article 8, expressing the parties' recognition that annual receipts from the sale of lands could not be predetermined, provided that:

> ". . . the whole subject be referred to the judgment of the President, who may, from time to time, prescribe

> how much of the net proceeds of said sales shall be paid out to the Delaware people, and the mode and manner of such payment . . . ; but Congress may, at any time, and from time to time, by law, make such rules and regulations in relation to the funds arising from the sale of said lands, and the application thereof for the benefit and improvement of the Delaware people, as may, in the wisdom of that body, seem just and proper."

10 Stat. 1050, Attach. 5a.

In 1866, the Delaware Tribe agreed by treaty to sell the remainder of its Kansas land and to remove to Indian Territory, now Oklahoma. Treaty of July 4, 1866, 14 Stat. 793, Attach. 10a. The United States, in turn, agreed to apply *some of* the proceeds from the sale of the Delaware land to the purchase of 160 acres of land from other tribes in Oklahoma for each Delaware. *The balance of the proceeds were to be added to the general fund of the Delawares.* Art. IV, *VI*, 14 Stat. 794, Attach. 13a.

Article III of the Treaty, however, allowed all adult Delawares the opportunity to elect to "dissolve" their relations with the Tribe, to reserve lands allotted them in 1860 from sale under the Treaty, and to become citizens of the United States. 14 Stat. 794, Attach. 12a-13a; J.S. App. 9a. Those Delawares who so chose to alienate themselves from the Tribe received, in exchange for their election, fee simple title to an 80-acre tract of land previously allotted, payment for all improvements made on such land, payment of their just proportion of the cash value of the credits of the Tribe "then held in trust by the United States" (this included proceeds from the sale of the Kansas trust lands), *except*

the assets now consisting of the funds appropriated to pay Indian Claims Commission Dockets 72 and 298, and payment of the individual's proportion of the proceeds from the sales under the 1866 Treaty. Art. IX, 14 Stat. 796, Attach. 16a-17a; J.S. App. 9a. Article IX of the Treaty further stated that those persons who elected not to remove to Oklahoma but, rather, to become citizens of the United States

> ". . . shall cease to be members of the Delaware tribe, and shall not further participate in their councils, nor share in their property or annuities."

14 Stat. 796, Attach. 17a.

The rights of the minor children of such adults (ancestors of the Kansas Delawares in these cases) were provided for in Article IX of the Treaty of 1866 as follows:

> *". . . all of the minor children of those who have become citizens shall be construed to have elected to sever their connection with said tribe for the time being, and be entitled to their just proportion of the annuities of the tribe, to be paid to the head of the family to be expended for their support and education until they shall attain the age of twenty-one years, after which each shall elect to remove to his tribe or to become a citizen of the United States, as hereinbefore provided, and if thus admitted to citizenship, shall be entitled to all the privileges and interests herein provided for the head of the family. Should any minor as aforesaid, arriving at the age of twenty-one years, and electing to become a citizen of the United States, or any adult Indian having so elected, fail to be admitted, he shall not be compelled to remove, but the Secretary of the Interior shall provide guardianship for the protection of his rights and interests and those of his family."*

A total of 21 adults ~~and their 49 minor children~~ elected citizenship and expatriation and were registered as having done so as required by Article IX.[2] J.S. App. 9a-10a. *The names of their 49 minor children who did not so elect but who remained in Kansas were also shown on the register.* The descendants of those Delawares who renounced their tribal relations and remained in Kansas, *who are also descendants of the minor children who remained in Kansas but who did not elect to sever their relations with the tribe,* constitute the members of the so-called Kansas "Delaware" class, ~~better named "alien claimants,"~~ plaintiffs/appellees in this action. *The Delaware Tribe was dissolved, its political government was abandoned except for advisory purposes and those former Delawares who elected to do so* ~~The Tribe thus~~ removed to lands in Oklahoma occupied by the Cherokee Nation and, in 1867, 985 persons were registered there as Delawares. These "registered Delawares" are the ancestors of the appellant Cherokee Delaware class, ~~the modern Delaware Tribe of Indians~~. J.S. App. 10a.

Removal to Indian Territory was accomplished pursuant to an 1867 agreement between the Delawares and the Cherokees. J.S. App. 10a. In accord with that contract, each

---

[2] Under the treaty terms the minor children of those who elected to stay in Kansas did not immediately become citizens; but, in 1874, Congress declared such persons to be citizens, appropriated funds *out of the Delaware trust assets* to pay them their proportionate share of *money and stocks* ~~assets~~ held in trust for the Delaware Tribe, and directed the Secretary of the Interior to issue them fee simple title to lands allotted them under the 1866 Treaty. Act of June 22, 1874, ch. 389, 18 Stat. 146, 175, Attach. 21a; J.S. App. 12a. *This Act did not purport to affect the status of such minors as Indians. They did not and could not resign from any Indian tribe since the Delaware Tribe of which they had been members was dissolved and abandoned in 1867. Cherokee Nation* v. *Journeycake,* 155 U.S. 196; *Delaware Indians* v. *Cherokee Nation,* 193 U.S. 127.

Delaware, using the proceeds from sale of the tribal lands, purchased a life estate in 160 acres of land and the right to become a member and citizen of the Cherokee Nation *was purchased by a payment from the trust funds to the Cherokee National fund a proportional amount. Cherokee Nation* v. *Journeycake, 155 U.S. 196.* J.S. App. 10a-11a. *The former Delawares who moved to the Cherokee Nation did so individually and not as a tribe.*

In 1875, Congress enacted the statute appearing at 18 Stat. 402, 43 U.S.C. § 189, which Act, relating to Indians who had resigned from their tribes, provided in part:

> *". . . Provided, That any such Indian shall be entitled to his distributive share of all annuities, tribal funds, lands, and other property, the same as though he had maintained his tribal relations; and any transfer, alienations, or incumbrance of any interest he may hold or claim by reason of his formal tribal relations shall be void."*

The Indian Claims Commission held, as the basis for all Delaware tribal claims before it, that "the Delaware Indians who removed to the Cherokee territory . . . maintained group identity, receiving annual payments from their own tribal funds, having tribal chiefs and groups and business committees continuously until the present time and at the present time," *but did not find that they were a tribe.*[3] The

[3] *Delaware Tribe of Indians* v. *United States,* 2 Ind. Cl. Comm'n 255, 260 (1952) (Finding No. 8), *aff'd,* 128 F.Supp. 391, 398 (Ct. Cl. 1955) (finding of fact affirmed, reversed on other grounds.) The Commission, in its Opinion, further elaborated on Finding No. 8:

> "It is undisputed that the main body of the Delawares and the group with whom the [United States] dealt as representing the Delaware Nation following the treaty of September 24, 1829, removed to the reservation ceded to the Delawares in Kansas, and that following the agreement of April 8, 1867, this group removed to the Cherokee Territory and its members, or most of them, became incorporated and merged for many purposes with the Cherokees. Nevertheless, this incorporation and merger did not result in the destruction of the continued activities of those so incorporated with the Cherokees as a distinct identity. They continued to maintain their tribal customs, practices, and their hereditary form of Delaware government. They received annual payments for many years from their own tribal funds, separate from the Cherokees. They had separate tribal funds in the hands of the U.S. as late as 1906. They were governed by hereditary tribal chiefs until the death of Charles Journeycake in 1895. Thereafter, they maintained a tribal council and business committee to perform the functions and duties previously performed by their chiefs. This tribal council and business committee have continuously functioned as an identifiable group." *Id.* at 265.

District Court materially adopted this finding of fact as the basis of its holding that the Fifth Amendment did not preclude the inclusion of the Cherokee Delawares ~~were entitled to share~~ in the awards in Indian Claims Commission Dockets 337 and 72 and 298, J.S. App. 11a, which the Kansas "Delawares" appealed in Case No. 75-1328. Probable jurisdiction has not been noted in that case. ~~The Delaware Tribe of Indians is today a federally recognized tribe operating under by-laws approved by the Commissioner of the Bureau of Indian Affairs. See Defendants Secretary and Delaware Tribal Business Committee Exh. 25, App. 101~~. *A constitution for an entity called the Delaware Tribe of Indians was adopted in 1974 and was approved by the Commissioner of Indian Affairs. This was after the challenged statute was passed and after these suits were filed.*

In 1892, the balance of the funds in the Delaware Tribal Trust Fund was distributed to the Registered Delawares (those who removed to the Cherokee Nation). In 1898, all Indians not residing on reservations were declared to be

[3] (Continued)

United States citizens and in 1925, all Indians were made United States citizens.

From 1867 to 1895, when the last chief died, the organization of the Delawares residing in the Cherokee Nation was advisory only, as all such former Delawares were politically Cherokees. After 1895, the only function of the Business Committee was to present claims to the United States on behalf of the Delawares. From 1904 to 1924, no Business Committee functioned and in 1924 it was reactivated. The Chairman of this reactivated Business Committee was Mr. Joseph A. Bartles, a Kansas Delaware, who was Chairman when the suit was filed in the Indian Claims Commission in 1951.

Congress, in passing the challenged distribution statute, chose ~~as the basis for determining the eligibility of the Delaware Tribe~~ a *as one of the bases for eligibility for inclusion on the roll for distribution of the funds from Indian Claims Commission Dockets 72 and 298 that the name of a person, or a lineal ancestor of such person be on the* 1906 Delaware per capita payroll. 25 U.S.C. § 1292 (Supp. IV, 1974). That roll originated in a series of suits, one of which concerned cession of the Kansas "outlet" in 1854, brought by the Delawares pursuant to a special jurisdictional authorization by Congress. *Other suits included claims which involved only the rights of Registered Delawares. In these suits, the Plaintiffs were:*

> *"The Delaware Indians, residing in and being a band of the Cherokee Tribe or Nation."*

Such suits were compromised and settled for a single sum of $150,000. Act of July 1, 1902. ch. 1375, § 68, 32 Stat. 716, 726;

J.S. App. 13a-14a n.15. In 1904, Congress appropriated funds for the payment of $150,000 in settlement of the pending tribal claims to "the Delaware tribe of Indians residing in the Cherokee Nation, as said tribe shall in council direct . . . ." Act of April 21, 1904, ch. 1402, § 21, 33 Stat. 189, 222, Attach. 22a. The Delaware Tribal Council subsequently adopted a resolution declaring that ~~members of the Tribe~~ *"the Delaware Tribe of Indians residing in the Cherokee Nation"* consisted of those Delawares on the 1867 register and their descendants. App. 90. A subsequent Council resolution authorized the United States to prepare a list of all persons eligible to receive a per capita payment of the settlement fund. See 25 Op. Att'y Gen. 308, 310 (1904).

In the course of this roll's compilation, representatives of the Delaware Indians requested that the Department of ~~the~~ Interior determine whether any Kansas Delawares were eligible to be included in the payment. Defendants Secretary and Cherokee Delawares Exh. 18, Letter of Jan. 25, 1905, App. 96. The matter was referred by the Secretary to the Comptroller of the Treasury. The Comptroller's decision held that Congress had appropriated funds payable to the Delaware *Tribe* "and that the Delaware Indians who, under the provisions of Articles III and IX of the treaty of July 4, 1866, . . . elected to dissolve their tribal relations and became citizens of the United States, are not legally entitled to be enrolled for participation in the distribution of said sum." 11 Comp. Dec. 496, 501 (1905). Accordingly, the Secretary of the Interior instructed the Union Indian Agency to compile the Delaware payment roll on the basis of the 1867 register and descent therefrom and to exclude those persons who had ~~dissolved~~ *elected to dissolve* their tribal relation

and had taken their allotments in Kansas. Defendants Secretary and Cherokee Delawares Exh. 18, Letter of March 22, 1905, App. ~~96.~~ *98*. The roll was completed according to instruction and approved in 1906. *Id.; see* J.S. App. 14a n.15.

History of the Indian Claims Commission Litigation

In 1951, members of the Absentee Delaware Tribe sued in the Indian Claims Commission (Docket No. 337) claiming additional compensation for lands ceded under the St. Mary's Treaty of 1818. J.S. App. 12a. The Commission found the value of the ceded Indiana lands to be far in excess of the lands received in Kansas by the Tribe and awarded $1.63 million "on behalf of the Delaware Nation of Indians as constituted at the time of the Treaty of October 3, 1818." *Absentee Delaware Tribe of Oklahoma* v. *United States*, 9 Ind. Cl. Comm'n 346 (1961); J.S. App. 12a. The suit had been filed on behalf of *all* descendants of the Tribe.

Funds were appropriated for payment of the judgment, and, in 1968, Congress passed legislation providing for its distribution. 25 U.S.C. §§ 1181-86 (1970). The distribution act provided that one was eligible to participate if his name or that of a lineal ancestor appeared on the 1906 Delaware per capita payroll, the 1940 Absentee Delaware constructed base census roll (or was eligible to be on such roll) or if he was able to show lineal descent from a member of the Delaware Nation as constituted in 1818. 25 U.S.C. § 1181 (1970). Thus the eligibility of the Cherokee Delawares (Delaware Tribe of Indians) was established through the 1906 roll, the Absentee Delawares through the 1940 roll, and the Kansas "Delawares" ~~and others~~ through the "catchall" clause. Distribution of the Docket 337 funds has never been completed ~~owing to conflicting and unwarranted claims, administrative appeals, and the present litigation~~. *because there were many claims by members of a group known as Munsee Indians who claimed ancestral ties to the historical Delaware Tribe but who had separated from the tribe and joined with other tribes before 1818, the date of the wrong for which the judgment in the Indian Claims Commission Docket 337 was granted. The Bureau of Indian Affairs contended that the Munsees were eligible and encouraged them to file claims. The delays which were granted for the filing of claims by Munsees, the processing of such claims, the contest as to their eligibility, the pendency of a suit brought by such Indians in Kansas, which suit was later dismissed, the administrative appeals and the present litigation all contributed to the delays. The claims of the Munsees were disallowed. The trial court specifically found that none of such delays or problems relating to the payment of Docket 337 involved claims by persons who are members of the Kansas Delaware class. The Kansas Delawares who filed claims were included on the payment roll for Docket 337 without dispute and no contention was made that they were ineligible for any reason.*

Paralleling the Docket 337 litigation was the Commission's adjudication and judgment of claims in Dockets 72 and 298, the distribution of which is the subject of this appeal. In 1950 and 1951, the Absentee Delaware Tribe of Western Oklahoma and the Delaware Tribe of Indians filed claims in the Commission for an accounting under the 1854 Treaty *on behalf of the Delaware Nation as it existed in 1854*. J.S. App. 15a-16a. The United States conceded it had

violated Article 2 of the Treaty by not selling the Delaware trust lands at public auction, and the Commission granted judgment "to the plaintiffs" in the amount of $9.17 million as of August 31, 1969. Those funds have been appropriated but not distributed.

The distribution act for the Dockets 72 and 298 judgment, 25 U.S.C. §§ 1291-97 (Supp. IV, 1974), made eligible for participation those living on the date of enactment whose name, or the name of a lineal ancestor, appeared on the 1906 Delaware per capita payroll or on the 1940 constructed base census roll of the Absentee Delaware Tribe (or was eligible to be on the roll). There was no catchall provision basing eligibility solely on descent from the 1854 Tribe, and the Kansas "Delawares" and others were thus excluded. This distribution statute also differed from the earlier Act in that it provided for payment of 10 per cent of the appropriated funds to the Delaware Tribe of Indians (an entity to be organized) and the Absentee Delaware Tribe of Western Oklahoma to be expended or invested for any purpose authorized by the tribal governing body and approved by the Secretary of the Interior. 25 U.S.C. § 1294 (Supp. IV, 1974).

The legislative history, including transcripts of the hearings before the Congressional Committees was considered by the trial court. This was because the Appellants contended that the exclusion of the Kansas Delawares by the challenged statute was a deliberate and conscious exclusion which was justified under the facts.

This legislative history shows that the purpose of the change from the criteria which had been used for the distribution of the Docket 337 funds was to exclude the Mun-

see Indians. There was NO consideration given to the fact that by using only the two designated rolls as a criteria for eligibility, the Kansas Delawares would be excluded. At one hearing, the legal representative of the Indians was asked whether, if the two rolls should be adopted without a catch-all clause, any Indian whose ancestors were with the tribe in 1854 would be excluded. He assured the Sub-committee that there would be no such exclusion.

At a Senate Sub-committee hearing, the Chairman of the Business Committee of the "Delaware Tribe of Indians" was asked if there was a tribal roll. He said that the only tribal roll was the list of those persons who had received payments under Docket 337, which of course included the Kansas Delawares.

The trial court properly found that not only was there not a deliberate and conscious exclusion by Congress of the Kansas Delawares but that Congress was unaware that there was such a group being excluded.

After the legislation was adopted and signed by the President, the exclusion of the Kansas Delawares was discovered. The Chairman of the Business Committee sought a conference with legislative representatives to discuss the unintended exclusion. Wanda June Weeks, one of the Appellees herein, sought, through Congressional representatives, relief against the erroneous exclusion. The appeal file of Wanda June Weeks includes correspondence which conclusively shows that the exclusion was an oversight.

The solution to the dilemma of the parties was an administrative construction of the statute to include those who were eligible to be on the 1906 Delaware per capita

payroll but were not. The Chairman of the Sub-committee on Indian Affairs, Committee on Interior and Insular Affairs, House of Representatives, was advised by a letter on May 1, 1973 from the Acting Director of Community Services, Bureau of Indian Affairs, that the Assistant Solicitor, Division of Indian Affairs, Department of the Interior, had issued a memorandum approving the administrative construction solution. Such letter advised that the Area Directors involved were being advised to implement that interpretation of the Act of October 3, 1972 in preparing the roll which would serve as the basis for distributing the judgment funds and that Mrs. Weeks should receive a letter of verification from the Muskogee Area Director. The Congress, therefore, took no action to correct the acknowledged error.

Instead of implementing the administrative construction solution, as Congress had been assured would be done, the claim of Wanda June Weeks was rejected on June 5, 1973 by the Tribal Operations Officer of the Muskogee Area Office of the Bureau of Indian Affairs. She exhausted her administrative appeals on her own behalf and on behalf of 37 members of her close family by an appeal to the Secretary of the Interior. The appeal was denied and the instant suit was filed.

Litigation in the District Court

Appellees filed two suits on behalf of themselves and as representatives of the descendants of the Kansas "Delawares" challenging the constitutionality of their exclusion as a class from distribution of the Docket 72 and 298 funds, the inclusion of the Cherokee and Absentee Delawares in

that award, and the inclusion of the Cherokee Delawares in the Docket 337 distribution. J.S. App. 4a. The cases were consolidated and a three-judge court was convened to hear the matter.

In the course of the litigation the Chairman of the Business Committee of the Delaware Tribe of Indians, who was also its general legal counsel, testified that he did not even learn that any ancestors of the Kansas Delaware class had resigned from the tribe until AFTER this suit was filed.

The majority of the court held, over a vigorous dissent, that the exclusion of the Kansas "Delawares" under the terms of 25 U.S.C. § 1292 *was not intended by Congress*, had no rational basis, *invidiously discriminated against the Kansas Delawares*, and thus violated the due process clause of the Fifth Amendment. J.S. App. 35a-51a, 64a. The court permanently enjoined the Secretary of the Interior from distributing funds pursuant to the statute.

The court unanimously rejected all assertions that the Cherokee and Absentee Delawares were ineligible to participate in the questioned funds.

Appellants Delaware Tribal Business Committee and its members in Case No. 75-1301, the Absentee Delaware Tribal Business Committee and its members in No. 75-1335, and the Secretary of the Interior in No. 75-1495 each appealed the District Court's ruling that the exclusion of the so-called Kansas "Delawares" in 25 U.S.C. §§ 1291-97 was unconstitutional. On June 14, 1976, the Court noted probable jurisdiction of all three appeals.

ADDITIONS TO STATEMENT

A.
TREATIES

In stating the historical background of this case, the Absentees, Appellants in Case No. 75-1335, treat the 1854, 1860 and 1866 treaties in one paragraph without considering them as separate developments in the history of the Delaware people. This does not give this Court a clear statement of the events as they bear on the issues in this case. To clarify this, we discuss these three treaties separately.

1854 Treaty between the United States and the Delaware Tribe of Indians (10 Stat. 1048)

This is the treaty which was breached by the failure of the government to sell lands at auction and which was the basis for the Indian Claims Commission award in Docket 72 and 298. The actual wrongful sales were in 1856 and 1857. At the time of these sales, the lineal ancestors of the Kansas Delawares were members of the tribe and were wronged to the same extent as their fellow tribal members.

The proceeds of the land sales were to be placed in a trust fund for the "Delaware people," not to "go to the Delaware Tribe" as stated on pages 10 and 12 of the Absentees' brief. (Article 8 of Treaty of 1854.)

1860 Treaty between the United States and the Delaware Tribe of Indians (12 Stat. 1129)

The only materiality of this treaty on the issues of this case is the effect it has on the status of the Absentee Delaware class. Article 4 of this Treaty, quoted on page 12

of the Absentees' brief, recognized that there were some Delawares "down among the Southern Indians" and that there was reason to believe that they would return soon. Provision was made for the setting apart for each of them of an 80-acre tract "to be allotted to them as they return" but no mention was made of the then existent Delaware tribal trust fund. Presumably, if they returned and rejoined the tribe, they would share in such fund in common with other tribal members. But, what the Absentees significantly fail to note is that the Absentees are descendants of those who refused to return to the tribe. They did not share in annuities or receive any part of the distribution of the very tribal trust fund which was diminished by the wrong which was the basis for the Indian Claims Commission award which is the subject of this suit.

The status of the Absentees as a class with a legitimate claim to share in the proceeds of such Indian Claims Commission award is the subject of an appeal by these Appellees in Case No. 75-1328.

1866 Treaty between the United States and the Delaware Tribe of Indians (14 Stat. 793)

By this treaty the Delaware Tribe agreed to remove to the Indian Territory *as a tribe*. An election was given to the adults who wished to remain in Kansas to do so and a condition of their resignation of their membership was that they would receive their proportionate part of the tribal assets. It was expressly provided that they would receive their proportionate part of the cash value of the credits of the tribe then held in trust by the United States. This was to exclude such adults from any *future* benefits which the

tribe might receive. The Absentees ask that this be construed to deny them their proportionate part of the claim *then* owned by the tribe for the breach of the 1854 treaty which claim is now represented by the appropriation of funds to pay the Indian Claims Commission award in Dockets 72 and 298.

In Article IX of this treaty it was provided that the minor children, ancestors of present Kansas Delawares, were granted an option to either "remove to his tribe" or to resign from the tribe upon reaching 21 years of age. The government, subsequent to this treaty, entered into a treaty with the Cherokee Nation (14 Stat. 799) under the terms of which the removing Delawares could elect to buy land west of 96° longitude in the Cherokee Nation and retain their tribal status, *or* they could elect to move east of 96° longitude, dissolve their tribe, and each Delaware Indian would become a member of the Cherokee Nation.

An election was made by the Delaware Tribe for its members to move *east* of 96° longitude by an agreement with the Cherokee Nation. The Delaware Tribe was abandoned and dissolved, contrary to the expectation in 1866, and the Delawares moved to the Cherokee Nation as individuals. The minors who remained in Kansas thus had no option available to them when they reached twenty-one years of age to remove to the tribe since under the terms of the Cherokee Agreement, no Indian not on the Registry of 1867 could join the Cherokee Nation.

B.

STATUS OF CHEROKEE AND ABSENTEE DELAWARES AND RELATION OF KANSAS DELAWARES TO SUCH GROUPS

After most of the former Delaware tribal members moved to the Cherokee Nation, they constituted a band and continued to have group identity, maintaining a chief until 1895. Thereafter, they have had only a Business Committee whose only function has been to pursue claims against the United States. Twelve suits were filed by such Cherokee Delawares which resulted in a settlement of $150,000. These suits were filed by the Cherokee Delawares, styling themselves as:

> "The Delaware Indians, residing in and being a band of the Cherokee Tribe or Nation" (Pl. Ex. 18, 19, page 35 of Index, Vol. XXVI of Record).

Congress appropriated the funds to pay the judgment entered for such settlement "to pay to the Delaware tribe of Indians residing in the Cherokee Nation, as said tribe shall in council direct. . . ." Act of April 21, 1904 (33 Stat. 222). Some of the Kansas Delawares had sold their lands in Kansas and had moved to the Cherokee Nation after 1867. The question then arose as to whether they would be entitled to share in the proceeds of the settlement. The Council of the Delaware band contended that they should not share. There was no judicial consideration of the matter but the Comptroller of the Treasury ruled that such funds were for the exclusive benefit of those Delawares who had moved to the Cherokee Nation under the terms of the agreement with the Cherokees in 1867. This result was not inconsistent with the position of the Appellees for the reason that the fund

being distributed was partly to compensate for wrongs committed after 1867 and which were against only the Cherokee Delawares. The payroll of 1906 which was prepared for such payment to Delawares residing in the Cherokee Nation, having been prepared for this specific and limited purpose, was not a roll of the historical Delaware Nation, or of those who were entitled to share for wrongs committed *prior* to 1867. Had it been such, it would have included the Absentees, if their contention in this case is correct.

From 1906 to 1924, the Business Committee of the Delawares became dormant. In 1924, it was reactivated and the Chairman who was elected was Mr. Joseph Bartles, son of Nannie Journeycake Bartles, one of the adult Kansas Delawares who remained in Kansas in 1867. Mr. Bartles served as Chairman until his retirement in 1952 and it was under his leadership that the Indian Claims Commission suits were filed in 1951 (Admissions of Appellants, Pl. Ex. 154, Adm. 51, 52, 54, 55, Vol. XXVII of the Record). When he resigned as Chairman, the General Council passed a resolution in which it recognized that he and other Kansas Delawares were to be considered as members of the group and to be entitled to share in all of its assets (Pl. Ex. 94, p. 36, Vol. XXVII of Record).

In 1958 about 350 persons met as the General Council of the Delaware Tribe of Indians for the purpose of defining the manner "under which the Delaware Tribal Business Committee shall represent, speak and act for the *individual members* of the Delaware Tribe on matters affecting the properties and general business of the Tribe." By-laws were adopted by a resolution providing for the qualification, elec-

tion, terms of office, etc. of the members of the Business Committee. Such resolution expressly reserved all questions of "membership, future membership or the loss of membership" to the Delaware General Council and the Commissioner of Indian Affairs (App. 101). Such By-laws were adopted by a vote of 132 persons (Def. Ch. Del. Ex. 25, Vol. XXIX of Record). In 1974, there were 7,765 Cherokee Delawares (J.S. 39a, n. 36). They were scattered throughout the United States, living in at least 25 states.

There were subsequent meetings of the General Council of the organization which called itself the Delaware Tribe of Indians. Members of the Kansas Delaware class attended, participated in its affairs, and no distinction was made between the Cherokee Delawares and the Kansas Delawares (pages 22-28, Trans. of Hearing on Prel. Inj., Ex. 15, Vol. XXVI of Record).

The United States sought a dismissal of the Indian Claims Commission Delaware claims on the ground that neither of the two groups which had filed the claims were federally recognized tribes. The Indian Claims Commission, and on appeal the Court of Claims, held that they were "groups" within the meaning of Section 70(a) of the Indian Claims Commission Act with standing to pursue the claims on behalf of the historical Delaware Nation.

The Absentees had organized as a separate tribe in 1957 and were thereafter federally recognized as a tribe separate and apart from the Wichita and Affiliated Bands of which they had been a part since 1856. They were not so recognized when the Indian Claims Commission actions were filed.

After judgment in Indian Claims Commission Docket 337, Congress enacted Public Law 90-508 (25 U.S.C. §§ 1181-86) in 1968 for the purpose of distributing an award for a wrong to the Delaware Tribe for the breach of an 1818 treaty. This Act provided that persons who could trace their lineal ancestry to the tribe as it existed in 1818 could qualify for payment. The Kansas Delawares qualified and over 300 of them filed claims which were approved and have been partially paid.

In 1972, after the awards were entered in Indian Claims Commission Dockets 72 and 298 and after an appropriation had been made to pay such awards, Sub-Committee hearings were held in both houses of Congress to consider a distribution statute. The two Indian groups had proposed legislation which provided that the roll for Docket 337 be updated and be used for the payment of Dockets 72 and 298 funds. This would have included the Kansas Delawares. During the course of these Sub-Committee hearings, the problem arose as to how to exclude a group of Munsee Indians whose ancestors had, prior to 1818, been members of the Delaware Tribe, but who had left the tribe and joined with New York Indians and, in common with them, had shared in other Indian Claims Commission awards. Since they were not with the Delaware Tribe in 1854, it was agreed that they were not eligible to share. Upon inquiry of the legal representative of the Delawares in the Indian Claims Commission cases as to whether the adoption of the 1906 payroll (Cherokee Delaware) and the 1940 census roll (Absentee Delaware) as the base rolls for the distribution of the Dockets 72 and 298 funds would exclude any members of the tribe as it existed in 1854, the Congress was

assured that this would not result (J.S. App. 66a-67a). In the Senate Sub-Committee hearings, the Chairman of the Delaware Tribal Business Committee (who is also one of its counsel in these appeals) was asked whether there was a tribal roll of the Delaware Tribe of Indians. He stated that the only tribal roll was the list of those persons who had shared in the Docket 337 funds, which, of course, included the Kansas Delawares. This same Chairman testified in the District Court that the status of the Kansas Delawares was never discussed or considered in the legislative hearings and that he had never read the 1866 Treaty until after this litigation was commenced (pp. 76, 82, Vol. XXXV of Record).

Congress, as is evidenced by the language in 25 U.S.C. § 1294(b), was aware that there was no legal entity known as the Delaware Tribe of Indians. It expressly provided that trust funds were to be withheld by the Secretary until such a legal entity could be formed.

After Congress enacted the challenged statutes, the Kansas Delawares made claims for per capita payments. The Act, in Section 1293, provided that representatives of the two "Oklahoma Delaware groups" were to review the applications. They did so and the applications of the Kansas Delawares were approved by such representatives.

After the Kansas Delaware claims were thereafter disapproved by Bureau of Indian Affairs officials because they could not trace their ancestry to the 1906 payroll of the Delawares residing in the Cherokee Nation, the Chairman of the Sub-Committee on Indian Affairs was notified. Representatives of the two Indian groups met with representa-

tives of the Bureau of Indian Affairs and an agreement was reached that the exclusion of the Kansas Delawares would be solved by an administrative construction by expanding the 1906 payroll to include those persons who qualified to be on such roll but who were not actually listed. Upon receiving such assurance that the problem of the erroneous exclusion of the Kansas Delawares would be so corrected, no amendatory legislation was offered. The Bureau, contrary to this agreement, did not administratively expand the 1906 roll to include the Kansas Delawares, but instead disapproved their applications. Administrative appeals were unavailing and suit was filed by Wanda Weeks in the District Court on August 28, 1973.

In 1974, the Delaware Tribe of Indians approved a constitution for the first time and submitted it to the Commissioner of Indian Affairs for his approval. This constitution defined the membership of the Delaware Tribe of Indians as being those persons "whose lineal ancestors meet the qualifications for participation in the distribution of Indian Claims Commission Dockets 72 and 298 awards, as specifically stated in 25 U.S.C.A. Sections 1292(a), (b) and (c)(1), excluding members of the Absentee Delaware Tribe of Western Oklahoma" (Answer to Interrogatory No. 12, Secretary of Interior, March 4, 1975, Volume III, page 6 of Answer at page 594 of Record). This constitution was approved by the Commissioner on September 30, 1974.

The membership of the Cherokee Delaware group was thus defined in terms of the challenged statute rather than, as asserted by all Appellants, the challenged statute having defined its membership. This "boot strap" effort to exclude

the Kansas Delawares for the first time from such membership after seventy-five years of participation as members of such group was only a self-serving act and should not, we submit, be material to this case. This is a classic example of an attempt to extend such power which this Court noted in *Baker* v. *Carr*, 369 U.S. 186, 216-17, could not be done. This extension of the label "Indian tribe" to cover a Business Committee whose only function is to present claims against the United States on behalf of descendants of the historical tribe who are non-ward, fully assimilated, non-reservation citizens of the United States scattered over at least 25 states, was an arbitrary measure designed to support the position of the Appellants in these cases.

The District Court case was tried on May 27, 1975. The Cherokee Delawares filed a Motion on July 7, 1975, reporting to the District Court that the legal entity known as the Delaware Tribe of Indians had been formed and approved by the Secretary as contemplated by 25 U.S.C. § 1294(b). The District Court declined to approve or disapprove the finding of the Secretary as to such legal entity as "that function is not within our issues or appropriate in our disposition" (J.S. App. 19a, n. 20).

SUMMARY OF ARGUMENT

1. Although the Appellants urge that the constitutional issues litigated and determined in the District Court are non-justiciable, it is clear that the Appellants' reliance upon these threshold arguments is misplaced. Analysis of the "plenary power of Congress in Indian affairs" reveals that that power is not, under the Constitution, unlimited, and that the statute challenged herein enjoys no immunity from review under well-developed Fifth Amendment standards.

The instant case does not involve a political question because, Congress having determined to distribute the judgment funds in question on an individual, per capita basis, the acknowledged—and only permissible—purpose of the legislation under review is to establish with reasonable accuracy a means of payment of the Indian Claims Commission judgment funds to the individuals who trace their ancestry to the historic tribal entity which suffered the wrong for which the Indian Claims Commission judgment seeks to compensate.

Given the judicial history of the Delaware claims, and the legislative history of the statute in question, it is likewise clear (assuming, arguendo, that the Cherokee Delawares and the Absentee Delawares are "tribes," as that term is used in cases in which legislation dealing with Indian tribes is held to be substantially immune from review) that the funds designated for distribution by the challenged statutes are not "tribal funds" and that in enacting this legislation, Congress was not making a present policy determination as to the means of discharging the

guardianship responsibilities of the federal government with respect to any existing tribe.

Moreover, the two groups styling themselves as tribes lack the factual attributes necessary to preclude review of legislation dealing with them or their "members"—and it is clear that a group may not be arbitrarily labeled as an "Indian tribe" for the purpose of erecting an extraordinary shield from review with respect to legislation dealing, *in part*, with fully emancipated individual citizens of fractional Indian blood who are asserted to be members of the "tribe."

The Appellants' objection to the use of the class action procedure is wholly without merit because the record clearly reflects (1) that all parties agreed that the action in the District Court should proceed as a class action; (2) that the two organizations as to which "tribal immunity" is urged were not sued in these actions in the District Court, but voluntarily intervened therein; (3) that the funds distributed to individuals, per capita, by the challenged statute are not tribal funds; and (4) the District Court granted no relief against any tribe or tribal organization.

2. The challenged statute violates the Due Process clause of the Fifth Amendment and is therefore void. Applying well-developed and familiar standards of Fifth Amendment review, it is clear that the Kansas Delawares stand on an equal footing with the designated beneficiaries of the Indian Claims Commission judgment in question and that no rationale exists or has been offered to justify their exclusion from participation in the judgment funds. It is abundantly clear from the record that the original adult

Kansas Delawares resigned from the tribe on the express condition that they would share in the assets now represented in part by the Dockets 72 and 298 judgment funds. Moreover, it is equally clear, on the "expatriation" issue, that the minor Kansas Delawares, from whom the present-day Kansas Delawares are also directly descended, never resigned from the Delaware Tribe. The argument that considerations of administrative convenience justify the exclusion of the Kansas Delawares is wholly fallacious because the Kansas Delawares (as is also the case as to the classes included in the subject statute) trace their ancestry directly to a specific roll prepared by the federal government—there is and was no need for a "catch-all" category to include the Kansas Delawares; consequently, time consuming resort to uncertain ethnological or tribal data is unnecessary in order to determine the claims of judgment fund applicants claiming as Kansas Delawares.

The subject statute is also violative of the Just Compensation clause of the Fifth Amendment in that the statute, by directing that the Dockets 72 and 298 funds be paid other than to the Kansas Delawares, purports to mandate a taking of the Kansas Delawares' individualized compensable interest with respect to those funds.

ARGUMENT

I.

THE DISTRICT COURT PROPERLY REACHED THE MERITS OF THESE CASES.

A.

Public Law 92-456 (25 U.S.C. §1291-97) providing for the distribution of previously appropriated Indians Claims Commission judgment funds to two statutorily defined classes of fully emancipated, non-ward, non-reservation recipients, without regard to tribal membership or relationship to any existing tribe, is not immunized by the political question doctrine of Lone Wolf v. Hitchcock, 187 U.S. 553, from constitutional review.

The Appellants urge that the doctrine as announced in *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 565, and consistently followed by the courts prevents judicial review of the challenged statute. That rule is:

> "Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."

The District Court acknowledged the limitations on its authority by virtue of this long-established rule but found that the subject statutes do not present policy determinations of the sort involving the treaty-making function, as was involved in the *Lone Wolf* case, and that the challenge to the classifications made here does not refer to the guardianship relation, nor to the discretionary exercise of the guardianship function by the Congress (J.S. App. 25a, 26a). The District Court noted that:

"'[T]he power of Congress over Indian affairs may be of a plenary nature, but it is not absolute.' United States v. Tillamooks, 329 U.S. 40, 54; see also United States v. Klamath Indians, 304 U.S. 119, 123; Chippewa Indians of Minnesota v. United States, 301 U.S. 358, 375-76; United States v. Creek Nation, 295 U.S. 103, 109-10; Stephens v. Cherokee Nation, 174 U.S. 445, 578; F. Cohen, Handbook of Federal Indian Law 91 (orig. ed. 1942)." (J.S. 26a)

The District Court noted that these recent enactments deal with equitable distribution following a judicial award, and with proper classifications for the distribution (J.S. App. 25a).

This case is therefore distinguishable from those cases which reiterate the *Lone Wolf* doctrine. Since the relations between the government and the Indians over which it presently exercises its guardianship function is not involved in the distribution of funds to compensate for a historic wrong, on a per capita basis, to a class of persons who are non-ward Indians with no relation to tribal entities, there is no political question which limits the Court's review of whether the challenged classifications meet the constitutional standards of rationality.

The Absentees somewhat audaciously argue that the District Court held that this Court in *Baker* v. *Carr, supra*, overruled, *sub silento*, the *Lone Wolf* case. It is clear that the District Court acknowledged the present applicability of the doctrine of the *Lone Wolf* case in those cases where political and discretionary functions are involved (J.S. App. 25a).

This Court has held that even in the management of real property belonging to a tribe, to which the United

States held legal title, and the tribe had only the right of occupancy, the Fifth Amendment prohibition against taking property without just compensation prevented the government from allowing another tribe to appropriate a portion of such land to its own use, and from confirming or making permanent the encroachment by one tribe on the reservation of another tribe. *Shoshone Tribe of Indians* v. *United States*, 299 U.S. 476.

In the case of *Lane* v. *Pueblo of Santa Rosa*, 249 U.S. 110, it was held that the Secretary of the Interior could be enjoined from "offering, listing or disposing" of tribal lands as public lands of a tribe which was under guardianship.

This Court said, in the case of *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272, 277-78:

"Where the Congress by treaty or other agreement has declared that thereafter Indians were to hold the land permanently, compensation must be paid for subsequent taking."

From these cases and those cited by the District Court (J.S. App. 26a) constitutional limits on plenary control of *tribal* property held in common become plainly apparent. The rights of individual Indians have likewise been held to be subject to constitutional protection. *Sizemore* v. *Brady*, 235 U.S. 441; *Jones* v. *Meehan*, 175 U.S. 1; *Choate* v. *Trapp*, 224 U.S. 665; and *Tiger* v. *Western Investment Co.*, 221 U.S. 286.

There is no problem of lack of discoverable and manageable standards for resolving the questions presented, or an impossibility of decision without an initial policy determination of a kind clearly for non-judicial discretion, see

Baker v. *Carr, supra; Powell* v. *McCormack,* 395 U.S. 486, 518-19, and it is clear that "Congressional enactments which may be fully within tne grant of legislative authority contained in the Commerce Clause may nonetheless be invalid because found to offend against the . . . Due Process clause of the Fifth Amendment . . ." *National League of Cities* v. *Usery,* ... U.S. ..., 96 S.Ct. 2465 at 2469.

Since this case involved only a determination of whether there was a sufficient rational basis to support the invidious discrimination against the Kansas Delaware class, and no "political questions" were involved, the District Court, under the above cited cases, correctly reached and decided the constitutional issues presented by the Complaints of the Appellees.

B.

The delegated plenary powers of the executive department may not be arbitrarily exercised to extend recognition as an existing tribe to the fully emancipated and assimilated northward lineal descendants of members of the historical Delaware Nation for the purpose of ascribing specially protected constitutional status to legislation affecting that group where the commonly accepted factual bases for such recognition do not exist.

In *Baker* v. *Carr,* 369 U.S. 186, 216-17, this Court, after noting the plenary power of Congress and the long-established policy of the government to determine for itself when the guardianship status of a tribe should cease to exist, said:

> "While '"It is for [Congress] . . . , and not for the courts, to determine when the true interests of the Indian require his release from [the] condition of tute-

> lage" . . . , it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe. . . .' United States v. Sandoval, 231 U.S. 28, 46, 34 S.Ct. 1, 6, 58 L.Ed. 107. Able to discern what is 'distinctly Indian,' ibid., the courts will strike down any heedless extension of that label. They will not stand impotent before an obvious instance of a manifestly unauthorized exercise of power."

The Delaware Tribe was abolished and abandoned and its political organization was dissolved in 1867. This Court so held over eighty years ago. *Delaware Indians* v. *Cherokee Nation,* 193 U.S. 127, 134-35, and *Cherokee Nation* v. *Journeycake,* 155 U.S. 196, 205.

From that time to the time the challenged statute was enacted, the "tribe" was nothing more than a Business Committee whose function was to present claims against the government. (See summary of evidence on pages 25-31 of the Plaintiff's Proposed Findings of Fact at Vol. XXIII of the Appeal Record.)

Legislation cannot be immunized from judicial scrutiny by a label applied to the subject matter. *Richardson* v. *Belcher,* 404 U.S. 78, 81. Nor can a discrimination be rationalized by the application of a label to a class of beneficiaries. *Johnson* v. *Robison,* 415 U.S. 361, 377-78.

This Court, in *Montoya* v. *United States,* 180 U.S. 261, 266, stated:

> "By a 'tribe' we understand a body of Indians of the same or similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory. . . ."

The Congress defined an Indian tribe in the Constitutional Rights of Indians Act, 25 U.S.C. § 1301, as follows:

> "(1) 'Indian tribe' means any tribe, band or other group of Indians subject to the jurisdiction of the United States and *recognized as possessing powers of self-government.*" (Emphasis added.)
>
> "(2) 'powers of self-government' means and includes all government powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies and tribunals by and through which they are executed, including courts of Indian offenses. . . ."

The group known as the Delaware Tribe of Indians (Cherokee Delawares) was not a tribal entity within the scope of the plenary power of Congress. (See pages 21-23 *supra.*) The late "recognition" of this group as a tribe for the purpose of administering 10% of the Dockets 72 and 298 funds was, we submit, but an arbitrary designation of such group as a "tribe" when, in fact, there was no semblance of the long-recognized indicia of tribal existence. *Cf. Davis* v. *Littell*, 398 F.2d 83 (C.A. 9th 1968), *cert. den.* 393 U.S. 1018 (1968), in which, although the status of Indian tribes was said to be "an uncertain one today," *Id.* at 84, the Court, in holding that the general counsel for the Navajo Tribe was, acting as such, immune from suit for defamation, relied heavily on the Navajo Tribe's numerous attributes of self-government and tribal infrastructure. The organizations involved in the cases at bar lack these attributes.

This Court has held that an arbitrary designation of a non-tribal group as an Indian tribe does not bring the relations with such group under the plenary powers of Congress

and immunize such group and such relations from the judicial processes.

The lower courts have recognized that whether a group is in fact an Indian tribe does not depend on whether there has been any federal "recognition" of such group as a tribe but rather whether the status of such group qualifies it to be considered a tribe with the historical attributes of such entities.

In *Joint Tribal Council of Passamaquoddy Tribe* v. *Morton*, 388 F.Supp. 649 (D.C.N.D. Maine 1975), *aff'd* 528 F.2d 370 (C.A. 1st 1975), it was held that the Passamaquoddy Tribe was an Indian tribe within the meaning of the Indian Nonintercourse Act, 1 Stat. 137, 25 U.S.C. § 177, even though the federal government had never given such tribe recognition.

In *United States* v. *State Tax Commission of Mississippi*, 505 F.2d 633 (C.A. 5th 1974), it was held that a band of Choctaw Indians, though organized under the Wheeler-Howard Act of 1934, 48 Stat. 984, and given full recognition by the Bureau of Indian Affairs as an existing Indian tribe, were nevertheless not an Indian tribe.

In *Perrin* v. *United States*, 232 U.S. 478, 486, this Court sustained the power of Congress to regulate the sale of intoxicating liquor on Indian land and, in reference to the plenary power of Congress, said:

> "As the power is incident only to the presence of the Indians and their status as wards of the government, it must be conceded that it does not go beyond what is reasonably essential to their protection, and that, to be effective, its exercise must not be purely arbitrary, but founded upon some reasonable basis.

> Thus, a prohibition like that now before us, if covering an entire state when there were only a few Indian wards in a single county, undoubtedly would be condemned as arbitrary. And a prohibition valid in the beginning doubtless would become inoperative when, in regular course, the Indians affected were completely emancipated from Federal guardianship and control."

The act of the Secretary in recognizing the Cherokee Delawares as an Indian tribe did not make them a tribe within the meaning of Article I, Sec. 8, Cl. 3 of the Constitution. This would be but an arbitrary extension of such power of the kind condemned in *Baker* v. *Carr, supra.*

C.

Assuming, arguendo, that the issue of membership in an Indian tribe, as presented by the Appellants, is a material issue in these appeals, Congress did not statutorily define the membership of Indian tribes by public law 92-456 (25 U.S.C. §1291-97).

It is argued by the Appellants that Congress intended by the challenged statute to define the membership of the Delaware Tribe of Indians and the Delaware Tribe of Western Oklahoma by the provisions relating to the criteria for per capita payments.

Congress did not provide that the 90% of the funds designated for individual, per capita distribution were to be paid to or through any tribal entity and there is no language in the statute which indicates that the membership of any tribal group was defined by the Act.

In adopting the 1940 base census roll (25 U.S.C. § 1291 (c)(2)) as one of the criteria for eligibility, Congress imposed no requirements as to blood quantum. The constitution of the Delaware Tribe of Western Oklahoma limits membership in the tribe of persons 1/8 or more Delaware blood (J.S. App. 48a, n. 40).

Likewise, in adopting the 1906 per capita payroll as one of the criteria for eligibility Congress imposed no requirement as to tribal affiliation and there were many members of the Delaware Tribe of Indians whose ancestors were not on the 1906 payroll (Exhibit 94, Vol. XXVII of Record).

Persons who have no connection with either tribal group were, under the express terms of the Act, declared eligible to share and it is clear that, as to the Delaware Tribe of Indians, the Congress did not recognize such group as an existing tribal entity. The 10% of the funds apportioned to the "Delaware Tribe of Indians" was to be held by the Secretary in trust pending the organization of a legal entity to receive those funds. 25 U.S.C. 1294(b) (Proviso).

The Delaware Tribe of Indians adopted a constitution after the challenged statute was enacted and *after* this suit was filed in which it attempted to define its own membership in *the exact terms of the challenged statute*. Prior to that time, the "tribal" roll consisted of the persons whose applications were approved to share in the Indian Claims Commission Docket 337 funds pursuant to another distribution statute, 25 U.S.C. §§ 1181-86. The prior statute could just as reasonably be read to have "statutorily defined membership" and the Kansas Delawares were included.

On page 23, note 23, of his Brief, the Secretary cites nine distribution statutes which he says provided for distri-

bution either to tribes or their members. None of these statutes provided for distribution to tribal entities but each did provide for distribution to *members of existing tribes.* In those instances in which Congress intended that the distribution be made to tribal members only, it said so. The difference between the challenged statute and the statutes cited in such footnote is noteworthy. There is no language in the challenged statute which is comparable to the language in the cited statutes.

In referring to the Committee to review each application, it is significant that the reference was not to representatives of tribes but was to "representatives of the two Oklahoma Delaware *groups.*" 25 U.S.C. § 1293.

Indian tribes have been recognized as having the sole authority to define their own membership except that the Secretary may define membership for the purpose of receiving federal funds. 25 U.S.C. § 163; *Martinez* v. *Southern Ute Tribe of Southern Ute Reservation,* 249 F.2d 915 (10th Cir. 1957), *cert. den.* 356 U.S. 960; *Fondahn* v. *Native Village of Tyonek,* 450 F.2d 520, 522 (9th Cir. 1971); and *Baciarelli* v. *Morton,* 481 F.2d 610 (9th Cir. 1973).

There is no suggestion in any of the cases that persons included in a roll for such payment become members of an Indian tribe for any other purpose.

In this case, it was not indicated that Congress intended to define tribal membership even for the purpose of the distribution of the Dockets 72 and 298 funds since payment was not made to tribal members but rather to individuals on a descendancy basis and no reference to tribal affiliation was required.

Moreover, if the Delaware Tribe of Indians was an Indian tribe as defined by Congress in the Indian Constitutional Bill of Rights Act, 25 U.S.C. § 1301 *et seq.*, the Kansas Delawares were members of such tribe. An adoption of a constitution in 1974 which defined membership in such manner that the Kansas Delawares would be excluded without according them the procedural safeguards of the Constitutional Rights of Indians Act would have been a violation of their rights under the terms of that Act (25 U.S.C. § 1301 *et seq.*).

The legislative history of the challenged statute is totally devoid of any indication that tribal membership was being considered or being defined.

D.

This action was a proper rule 23(b)(1)(B) and 23(b)(2) class action. All parties in the District Court stipulated that the action could proceed as a class action. The two alleged tribal groups voluntarily intervened in the action and any sovereign immunity which either of such tribal groups may have had is immaterial.

The Absentee Delawares argue that the District Court erred in employing the class action device in this suit, asserting that its use was a "sleight of hand" to avoid the sovereign immunity of the "tribe."

At the pre-trial hearings, the Absentees expressly agreed that the case could proceed as a class action. (See page 70, Transcript of Pre-Trial Conference, February 28, 1974; and pages 18, 95 and 100, Transcript of Pre-Trial Conference, March 5, 1974, Volumes XXXIII and XXXIV of Record.)

On February 11, 1974, the Plaintiffs filed a formal verified motion for an order directing that the action proceed as a class action, describing the Kansas Delaware class by the name of each ancestor, and describing the Cherokee Delaware and Absentee Delaware classes (App. 26). The Secretary and the Absentee Delaware class filed a response on February 21, 1974 (page 91, Volume I of Record) which was on behalf of the "Delaware Tribe of Western Oklahoma, designated by plaintiff in the Complaint as Absentee Delaware Tribe of Oklahoma Business Committee" and the individual representatives of the Absentee class. In this response, it was stated that these parties had no objection to the case proceeding as a class action so long as there was a limitation on the membership of the Plaintiff class and alleged that "[t]he defined members are identifiable class for utilization of Rule 23(b)(3), Federal Rules of Civil Procedure."

In a motion to dismiss the action filed April 9, 1974, the Absentee class raised the question of tribal immunity but no objection was ever raised in the District Court by the Absentee class or the tribe to the use of the class action device, but they, in fact, approved the class action procedure.

The Weeks case and the Frazier case (both filed by Kansas Delawares) were consolidated by Order filed April 22, 1974 (Volume VII of Record, page 1194). On May 22, 1975, the "Absentee Delaware Tribe of Western Oklahoma Business Committee, and the individual members thereof on behalf of the Absentee Delaware Tribe of Western Oklahoma" filed a motion for leave to intervene in the Frazier

case (Volume IX of Record, page 1705) and on the same day an Order was entered granting intervention (Volume IX of Record, page 1710). The tribal entity was thus a party to the case in its own right and upon its own motion.

The District Court granted no relief against the tribes or their tribal authorities as such and ordered that the judgment not be construed as a binding adjudication affecting them (J.S. App. 23a).

II.

PUBLIC LAW 92-456 (25 U.S.C. §§1291-97) IS VOID FOR VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT IN THAT SAID STATUTE, DESIGNATING A CLASS OF PERSONS TO RECEIVE INDIAN CLAIMS COMMISSION JUDGMENT FUNDS ON A PER CAPITA BASIS, WHICH FUNDS HAD THERETOFORE BEEN APPROPRIATED TO SATISFY A JUDGMENT COMPENSATING FOR A WRONG TO THE HISTORICAL DELAWARE TRIBE, EXCLUDES AND INVIDIOUSLY DISCRIMINATES AGAINST A CLASS OF PERSONS, THE KANSAS DELAWARE CLASS, WHICH STANDS ON AN EQUAL FOOTING WITH THE BENEFITTED CLASSES.

A.

The legislative purpose to be served by the enactment of the challenged statute was to provide a plan for the distribution of the Indian Claims Commission Dockets 72 and 298 funds to the present representatives of the persons who were wronged in 1854.

The constitutional principles herein discussed do not, of course, take on meaning in the case at bar unless they are applied to the facts. Appellees invoke the Due Process and Just Compensation clauses of the Fifth Amendment.

In applying the relevant Due Process principles to the facts, Appellees submit that the critical step should be to determine the "legislative object" in enacting the judgment legislation in question.

The judgment legislation in question is plainly not welfare legislation. There is nothing in the appropriation acts, in the distribution statutes or in the legislative history to suggest this. What the Committee testimony does reveal is that the only congressional purpose in enacting this legislation was to define the classes of ultimate recipients of the funds so as to include the present-day representatives of the persons who were wronged in 1854 (J.S. App. 66a-67a). This purpose is consistent with prior claims litigation and judgment legislation and is supported by purpose and legislative history of the Act under which the claims in Dockets 337, 72 and 298 were brought to judgment:

> "And so the present generation of Indians is entitled to claim the funds that were set aside in trust for them, in place of the lands that they would own today if these transactions had never been consummated." House Report No. 1466, December 2, 1945, accompanying the Indian Claims Commission Act (25 U.S.C. §§ 20 *et seq.*), 1946 U.S. Code Cong. Service p. 1347.

When the matter is viewed against the background of the purpose of the Indian Claims Commission Act, and the *nature of the rights adjudicated* in the Indian Claims Commission, including particularly the nature of the rights adjudicated in Dockets 337, 72 and 298, it becomes manifest that the *only* valid or permissible legislative object in passing judgment legislation is to define the ultimate recipients

of the funds as described above. The matter might be different if Congress were writing on a clean slate, as when it enacts welfare legislation unburdened by historical, treaty-created rights and adjudicated rights—but even in welfare legislation, baseless distinctions do not pass muster. *United States Department of Agriculture* v. *Moreno*, 413 U.S. 528; *Weinberger* v. *Weisenfeld*, 420 U.S. 636.

Given this purpose, it was the task of Congress to enact statutes inclusive of the true, present-day beneficiaries of these judgments. The Appellees do not question the power of Congress to provide appropriations for and to distribute benefits to Indian tribes in the exercise of its plenary powers where there are existing Indian tribes and where present policy considerations of the relations with such Indian tribes and their members are involved. But, where there are no such present policy questions and the appropriations and distributions are to compensate for historical wrongs to a dissolved and abandoned tribe, the Appellees contend that no political questions are involved which immunize the Congressional acts from judicial scrutiny under the Fifth Amendment principles. The Appellees further contend that the Congress may not extend the tribal label to a group of Indians in order to distribute funds to such tribe and in so doing exclude persons with a claim to such funds which stands on equal footing with the members of such newly-recognized "tribe." *Baker* v. *Carr*, *supra*.

The Secretary, on page 33, note 33, of his Brief, states that, as evidence that Congress intended to award the entire judgment to the modern successors of the Delaware Tribe, the statute provides "that the tribes must in turn

allocate the bulk of their portion to certain designated members." There is no such provision in the statute. The Absentee portion of the ten per cent was to be used "for any purpose that is authorized by the tribal governing body and approved by the Secretary of the Interior" (Section 1294(a)).

In the latter portion of this footnote, the Secretary, in a quotation from Section 1294(b), dropped the words "Delaware Tribe of Indians" and replaced them in brackets with "Cherokee Delawares." There is no reference in the statute to "Cherokee Delawares."

In the statute for the distribution of the Docket 337 funds, Congress referred to the Absentees by the tribal name but the Delaware Tribe of Indians was not named. Rather, expense reimbursement was to be made to the "Cherokee Delawares."

It is submitted that there is nothing in the challenged statute which indicates that the purpose of Congress in the enactment of the challenged statute was anything other than to compensate the present representatives of the persons wronged in 1854 and no purpose to provide benefits to an existing tribe known as the Delaware Tribe of Indians as successor to such persons or otherwise, is shown.

B.

In view of the legislative purpose for which the Congress enacted the statute in question, the District Court correctly determined that the challenged statute embodies an invidious discrimination in violation of the due process clause of the Fifth Amendment.

The District Court found that the Kansas Delawares and the other two classes stood on equal footing with respect to their claims to share in Dockets 72 and 298 funds. In doing so, the District Court applied long-established and accepted Fifth Amendment tests "applied in light of the purposes of the Indian Claims Commission Act, the treaties and the relief of the award affords for injury to the ancestral tribe" (J.S. App. 49a). The District Court found that the "unequal treatment rests on no foundation rationally related to a legitimate governmental interest serving the purposes of the Act" (J.S. App. 50a).

The rationality standards applied by the District Court were those approved by this Court in many cases. *Weinberger* v. *Salfi*, 422 U.S. 749; *United States Department of Agriculture* v. *Moreno*, 413 U.S. 528, 533; *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 172-73; *Richardson* v. *Belcher*, 404 U.S. 78, 81-82; *McDonald* v. *Board of Election Commissioners*, 394 U.S. 802, 809.

Classifications in statutes must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. *F. S. Royster Guano Co.* v. *Commonwealth of Virginia*, 253 U.S. 412, 415; *Reed* v. *Reed*, 404 U.S. 71, 75-76. See also, *Johnson* v. *Robison*, 415 U.S. 361, 374-75.

It is undisputed that lineal ancestors of the present Kansas Delaware class were members of the tribe in 1854, the time of the wrong. Without consideration of any subsequent events, they would stand on equal footing in relation to a claim to share in compensation for such wrong.

It has been the position of the Indian Claims Commission and the Court of Claims that maintenance or lack of maintenance of tribal relations by parties wronged by a breach of a treaty does not affect the right of lineal descendants of the parties wronged to share in funds appropriated to compensate for such wrong. *McGhee* v. *Creek Nation*, 122 Ct.Cl. 380, 388, *cert. den.* 344 U.S. 856.

In 1974, in the case of *Turtle Mountain Band of Chippewa Indians* v *United States*, 490 F.2d 935, 954, the Court of Claims reiterated the rule:

> "As we held in *McGhee*, the ancestral group 'owns' the claim, and present-day Indian groups are before the Commission only on behalf of the ancestral entity."

This principle of "ownership" of a claim before the Indian Claims Commission has been established for 24 years and, as to the Delawares, no events which occurred after 1854 would affect the rights of the Kansas Delaware class to share in the award.

Assuming, *arguendo*, that "subsequent events" can afford a rationale to exclude members of the Kansas Delaware class, the inquiry is whether there were any such events sufficient to form the rationale to support what is otherwise an invidious discrimination.

The Appellants cite the events which they contend justify such discrimination as follows:

(a) The Appellants contend that the adult Kansas Delawares resigned from the tribe under the Treaty of 1866 and gave up any rights to share in the property or annuities of the Delaware Tribe.

The claim which was reduced to judgment in Dockets 72 and 298 is not an asset or benefit which was received by the tribe after 1866 but was a claim then owned by the tribe. The condition of the resignation of the adult Kansas Delawares was that such persons would receive their pro-rata share of the trust fund now represented in part by the appropriated funds in issue.

The Appellants' contention as to the effect of this resignation presents the anomaly that the United States and the Delaware Tribe, who agreed by the Treaty of 1866 that resigning members of such tribe, *as a condition to their resignation*, were entitled to receive their pro-rata part of what is now an appropriated fund (Article IX, Treaty of 1866, J.S. App. 113a), now seek to offer as a rationale for excluding the descendants of such resigning members from pro-rata share of such funds, that *their ancestors resigned from the tribe.*

The irrationality of this contention is evident.

(b) The Appellants contend that the minor children of the adult Kansas Delawares were granted citizenship by the United States in 1874 (Act of June 22, 1874, 18 Stat. 146, 175) and, asserting that there was an incompatibility between United States citizenship and tribal citizenship, contend that this Act terminated the membership of such minors in the tribe.

Many cases, cited under Proposition II-C of this brief have held that United States citizenship is not incompatible with tribal membership. Therefore, the asserted "event" of termination of tribal membership did not occur.

(c) The Appellants contend that in 1904 an appropriation was made to the Delaware Tribe residing in the Cherokee Nation, in settlement of claims asserted only by the band of Delawares within the Cherokee Nation, and the Kansas Delawares were not included on the payroll for the payment of such appropriation.

This payroll was a special roll for a specific appropriation which, by the terms of the appropriation act, did not include the Kansas Delawares. This affords no rationale to exclude the Kansas Delawares from a roll to be prepared to compensate for a wrong which was suffered by their lineal ancestors when those ancestors were with the tribe.

(d) The Appellants contend that the Kansas Delawares did not participate in the Indian Claims Commission actions. The entities and parties who did bring and prosecute the Indian Claims Commission actions did so on behalf of the historical tribe, as representatives of such tribe. See *McGhee* v. *Creek Nation, supra*. No participation by the Kansas Delawares as a named group was necessary for them to be able to assert their claim.

Further, the Kansas Delawares were participating members of the Delaware Tribe of Indians, one of the claimant groups, and a Kansas Delaware was chairman of the Delaware Tribal Business Committee at the time the Indian Claims Commission suits were commenced. The Delaware Tribe of Indians, by resolution after the Indian

Claims Commission actions were filed, acknowledged the right of Kansas Delawares to share in tribal assets. Exhibit 94, Vol. XXVII of Record.

This asserted supporting rationale for the discrimination is without substance.

(e) The Appellants contend that there were difficulties in the administration of 25 U.S.C. §§ 1181-86 (Pub. Law 90-508, 82 Stat. 861) which Congress sought to avoid in the distribution of the subsequent award under the Act here in issue.

The asserted administrative difficulties did not involve the Kansas Delawares (see J.S. App. 30a-39a) and an exclusion of the Kansas Delawares was unnecessary to prevent such difficulties since the names of the lineal ancestors of the Kansas Delawares appear on an official roll filed with the Commissioner of Indian Affairs pursuant to Article IX of the Treaty of 1866. There is thus no need to refer to vague and uncertain ethnological evidence to substantiate the payment applications of the Kansas Delawares. (See discussion of this asserted rationale in the opinion of the District Court (J.S. App. 35a, 39a).)

The Secretary suggests that there are reasons in addition to events subsequent to 1854 which justify the discrimination. The reasons are:

1. To require that the Secretary undertake individualized adjudications of descendancy from tribal members in the distant past will impose a "massive and unyielding administrative burden on the Secretary."

This suggestion is a bugaboo.[4] As stated, the Kansas Delawares are lineal descendants of persons on a recorded roll of 69 ancestors. The roll for the payment of Docket 337 funds (25 U.S.C. § 1181) needs only to be opened and updated. There is no administrative burden in so doing which is any different than the use of rolls which form the basis for eligibility in all the other distributions of Indian Claims Commission awards which have been made on a descendancy basis. It is, in fact, less burdensome since there is recorded roll of Kansas Delawares and no "catch-all" clause is necessary to effect their inclusion.

---

[4] "Catch-all" provisions are in many distribution acts. See 25 U.S.C. §967(a) which included all Indians "who possess original Omaha blood of the degree of one-fourth or more."

See 25 U.S.C. §601 (Yakima Tribes) which provides eligibility for "all living persons who are of the blood of the fourteen original Yakima Tribes, parties to the treaty of June 9, 1855" and whose ancestors received certain allotments.

See 25 U.S.C. §1011 (Snake or Paiute Indians of Oregon) which provides for eligibility to all descendants of any members of the bands of Indians whose chiefs signed the treaty of December 10, 1868.

See 25 U.S.C. §1101 (Nooksack Tribe) which provided eligibility to "descendants of members of the Nooksack Tribe as it existed in 1855."

See 25 U.S.C. §1131 (Duwamish Tribe) which provided eligibility to "descendants of members of the Duwamish Tribe as it existed in 1855."

See 25 U.S.C. §1151 (Chehalis Tribe) which provided eligibility to "descendants of members of the Upper and Lower Chehalis Tribes as they existed in 1855."

See 25 U.S.C. §1232 (Chemehuevi Tribe) which provides for eligibility to "descendants of members of the Chemehuevi Tribe as it existed in 1860" and "on any other available census roll or other record or evidence acceptable to the Secretary."

In each distribution statute where Indian Claims Commission funds are to be distributed through the tribal entities to members of the tribe, it is necessary to prepare updated rolls under the supervision of the Secretary.

Assuming, *arguendo*, that there would be an administrative burden involved in the preparation of the roll for distribution if such roll included the lineal descendants of the Article IX Kansas Delawares, to eliminate such parties on this basis is an "arbitrary legislative choice" which denies equal protection of the laws. *Reed* v. *Reed*, 404 U.S. 71, 76. Congress may not casually deprive a class of individuals of their rights because of some remote administrative benefit to the government. *Carrington* v. *Rash*, 380 U.S. 89, 96. The Constitution recognizes higher values than speed and efficiency. *Stanley* v. *Illinois*, 405 U.S. 645, 656.

2. The Appellants contend that if the subject funds had been designated for distribution to the tribes (rather than to individuals) and the tribes had distributed the funds to their members, the result would have been the same as under the challenged statute and would have been immune from constitutional attack.

This rationale is faulty for several reasons. First, the Congress did not determine that the two modern day groups are representative of the historical tribe. Second, at the time of the enactment of the subject statute, the Kansas Delawares were recognized as members and were participating in the affairs of the "Delaware Tribe of Indians" and would have received their pro-rata share of such funds. The "roll" of such tribe was the payment roll for the Docket 337 funds. Third, the distribution statute does not require that the individuals to be included on the payment roll have any affiliation with modern-day tribal entities. Fourth, the distribution statute as adopted by Congress provided for distribution to many persons who

were not eligible to be, and were not, members of the Absentee tribe (J.S. App. 38a, note 35).

3. The Secretary asserts that the Cherokee Delawares and Absentee Delawares "are wards of the nation" and that the ancestors of the present Kansas Delawares ceased being wards of the nation more than a century ago when they left the tribe (Brief for the Secretary of the Interior, pp. 26, 27).

None of the claiming parties are wards of the nation. They are all emancipated, fully assimilated Indians and the distinction urged is contrary to the facts. The United States in the Indian Claims Commission action leading to the judgment in Dockets 72 and 298 sought a dismissal of the actions on the grounds that the Delawares were non-wards and were unsuccessful only because the Indian Claims Commission found that they constituted "identifiable groups" with standing to represent the historical tribe. (See brief by the United States in Indian Claims Commission Docket 27A, filed June 16, 1952, pp. 26, 31.) There is no proof in the record to sustain the claim of "wardship."

The Appellees submit that none of the suggested reasons for excluding the Kansas Delawares from the distribution of the award meet the test of rationality, given the legislative purpose to be served by the statute, *viz.*, to compensate the present representatives of the Delaware Tribe as it existed in 1854.

C.

Assuming, arguendo, that the issue of "expatriation," as presented by the Appellants, is a material issue in these appeals, the statutory grant of citizenship to the Kansas Delawares who were minors in 1867 did not result in an "expatriation" of such minors.

The Absentees argue that when Congress, by the Act of June 22, 1874 (18 Stat. 146, 175), conferred United States citizenship on minor Kansas Delaware Indians, the effect was to terminate their membership in the Delaware Tribe of Indians, citing *Elk* v. *Wilkins,* 112 U.S. 94. This argument is based upon the assertion that this Court held in the *Elk* case that United States citizenship and Indian tribal membership are incompatible. The *Elk* case did not so hold. The holding in *Elk* was that an Indian could not at will claim United States citizenship by virtue of the fact that he had resigned from an Indian tribe. This Court stated that United States citizenship could only be conferred by the United States. The Court did not discuss any question of incompatibility between tribal membership and United States citizenship.

This Court in many cases has held that such dual memberships are not incompatible. *United States* v. *Nice,* 241 U.S. 591, 598; *United States* v. *Noble,* 237 U.S. 74, 79; *Hallowell* v. *United States,* 221 U.S. 317, 324; *Williams* v. *Johnson,* 239 U.S. 414, 420; *United States* v. *Sandoval,* 231 U.S. 28, 48.

The right of an Indian to membership in his tribe is a valuable right which cannot be terminated except by a clear and unequivocal Act of Congress. This Court has

held that a mere grant of United States citizenship does not terminate Indian tribal membership. *Winston* v. *Amos*, 255 U.S. 373.

III.

WHEN THE ADULT KANSAS DELAWARES RESIGNED FROM THE TRIBE IN 1866 ON THE EXPRESS CONDITION THAT THEY WOULD BE ENTITLED TO RECEIVE THEIR PRO-RATA SHARE OF THE TRIBAL TRUST FUND, THEIR INTEREST IN SUCH FUND, INCLUDING ANY ADDITIONS THERETO FOR WRONGS PRIOR TO 1866, BECAME INDIVIDUALIZED AND IS A PROPERTY RIGHT WHICH IS PROTECTED AGAINST UNCOMPENSATED TAKING BY THE JUST COMPENSATION CLAUSE OF THE FIFTH AMENDMENT.

The District Court found that the Kansas Delawares had no vested rights which if taken without compensation would be protected by the just compensation component of the Fifth Amendment (J.S. App. 61a, 62a). Since the subject statute was found to be invidiously discriminatory and unconstitutional when measured by familiar standards of due process and equal protection, the finding that the just compensation component of the Fifth Amendment had no application to the case was not appealed from. However, if for any reason this Court should find that the subject distribution statute was not invidiously discriminatory against the Kansas Delawares, the decision of the District Court should nevertheless be affirmed on the ground that the subject distribution statute was unconstitutional for the reason that it provided for the taking of property of the Kansas Delaware class without just compensation. In *Helvering* v. *Gowran*, 302 U.S. 238, 245 (1937), the Court stated:

> "In the review of judicial proceedings the rule is settled that, if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason."

See also, *United States* v. *Powell*, 423 U.S. 73 (1975), and *Dandridge* v. *Williams*, 397 U.S. 471, 475-76 (1970).

This claim is asserted by the Kansas Delawares as direct blood descendants and thus as representatives of the adult Delaware tribal members who resigned from the tribe pursuant to Article IX of the Delaware Treaty of 1866 (14 Stat. 793) on the express condition that they would receive their just proportion of the Delaware tribal trust fund. An individualization of a trust fund by a treaty which has been carried into effect has been recognized as creating a right which is protected by the Fifth Amendment against taking without just compensation. *Jones* v. *Meehan*, 175 U.S. 1; *Choate* v. *Trapp*, 224 U.S. 655. See also, *Sizemore* v. *Brady*, 235 U.S. 411.

Such a taking without just compensation offends the Fifth Amendment even though the "taking" is in the form of a benefit belonging to one Indian group being conferred on another Indian group, *Shoshone Tribe of Indians* v. *United States*, 299 U.S. 476; *United States* v. *Creek Nation*, 295 U.S. 103; or, selling lands belonging to a tribe as public land, *Lane* v. *Pueblo of Santa Rosa*, 249 U.S. 110; or, taking individualized Indian land, *Big Eagle* v. *United States*, 323 F.Supp. 60; or, misappropriating individualized Indian funds. *Miami Tribe of Oklahoma* v. *United States*, 281 F.2d 202, *cert. den.* 366 U.S. 924.

The just compensation claim of the Appellees was denied on the basis that Congress, in adopting the Indian Claims Commission Act, had reserved to itself the procedures for the subsequent distribution and determination of whether portions of the fund should be held in trust for the Indians' benefit. The District Court said:

> "In light of these undecided points remaining for congressional decision after entry of the Commission's award, it seems clear that no individual or class property right attaches or vests in the Commission's award as entered, such rights depending on later congressional determination" (J.S. App. 63a).

It is submitted that entitlement to relief under the just compensation clause is not dependent upon a finding that a property right had "vested" under the common-law precepts. The question is whether such rights became individualized by an implemented treaty so that a taking of those rights would offend the just compensation clause.

When the 21 adults (an "identifiable group" of Indians as the term is used in the Indian Claims Commission Act (25 U.S.C. § 70a)) elected to resign on the condition that they would receive their just proportion of the very funds here in dispute, a register was made identifying those persons and was filed with the Commissioner of Indian Affairs as provided in Article IX of the Treaty. Their just proportion was then determined and, we submit, that their proportionate share of the subject funds is a valuable property right. The Act in question did not provide for compensation to such persons or their lineal descendants or heirs. The Act did not take their right into account to any degree.

It is submitted that the claim presented to the Indian Claims Commission in Dockets 72 and 298 belonged to the Delaware Tribe as it existed in 1854; that a proportionate part of such claim passed to the adult Kansas Delawares in 1866 by virtue of Article IX of the Treaty of 1866; that when the funds were appropriated to pay the proceeds of this claim to individuals and not to modern tribal entities the present representatives of such adult Kansas Delawares had such an interest therein that the exclusion of them from the distribution and the distribution of all of the funds to other individuals was a taking of property without just compensation. See *Jones* v. *Meehan, supra*; *Choate* v. *Trapp*, 224 U.S. 665, 672-77; *Miami Tribe of Oklahoma* v. *United States*, 281 F.2d 202, 212 (Ct. Cl. 1960) Relief by way of an injunction prior to a proposed unconstitutional distribution is proper. *Lane* v. *Pueblo of Santa Rosa, supra*. The decision of the District Court that the statute was unconstitutional should be affirmed on this basis, in addition to the basis upon which the District Court held the statute to be invalid.

ISSUES NOT PRESENTED BY THESE APPEALS

The Appellants have throughout their briefs made incorrect statements as to what the District Court did. While the Opinion and Judgment of the District Court speak for themselves, the Appellees point out the references by the Appellants which can be misleading and which misstate the issues in this case.

Brief of Delaware Tribal Business Committee, et al., Case No. 75-1301

1. The District Court did not "instruct Congress as to how it shall deal with Indian tribes" (page 14).

2. The District Court did not say that "it is irrational to draw a distinction between Indian tribes and their members and ordinary American citizens of some decree of Indian descent" (page 14).

3. The District Court did not evade the prohibition of suits against Indian sovereign bodies by the misuse of a class action to place a tribal asset in jeopardy" (page 16).

4. The District Court did not feel "that application of the treaties according to their plain terms would work an inequity and therefore, in effect, revised them" (page 17).

5. The District Court did not hold "the treaties by which the Delaware claim and award arose as only marginally relevant to the resulting distribution" (page 23).

6. The District Court did not conclude "that the Government did not have a legitimate interest in legislating specially on behalf of Indian tribes and their citizens" (page 25).

Brief of Absentee Delaware Tribal Business Committee, Case No. 75-1335

1. The essence of the District Court's opinion was not "its view that Lone Wolf had been impliedly overruled by the reasoning of Baker v. Carr" (pages 26, 31).

2. The District Court did not conclude that "the Constitution requires Indian claims judgments to be paid to

all those individuals who are lineal descendants of the ancient tribe, as it was composed at the 'time of the wrong'" (page 38).

3. The District Court did not say "that all that is necessary to evade the rule that Indian tribes are immune from suit is to certify the persons whom Congress had denominated members of the tribe as members of a class" (page 42).

4. The District Court did not instruct that Congress should legislate again (page 46).

5. The District Court did not vitiate "the distribution statute to the two federally recognized Delaware Tribes" (page 47).

6. The District Court did not inquire "with the greatest detail into the motives which it believed moved Congress to enact the statute now at bar" (page 49).

7. The District Court did not "disregard" the provisions of Article IX of the Treaty of 1866 (page 60).

Brief of the Secretary of the Interior, Case No. 75-1495

1. The District Court did not reject "the decision of Congress to distribute the judgment of the Indian Claims Commission to tribal members" (page 12).

2. The District Court did not interpret "the Due Process Clause to require, in essence, a *per capita* distribution of the judgment to all lineal descendants of members of the Delaware Tribe at the time of the alleged wrong" (page 12).

3. The District Court did not deprive "Congress of its discretion to determine the most beneficial method of allocating tribal property" (page 12).

4. The District Court did not "ignore two centuries of precedent" and did not "invade an area reserved under the Constitution to Congress" (page 20).

5. The District Court did not require the Secretary "to undertake individualized adjudications of descendancy from tribal members in the distant past" (page 23).

6. The District Court did not consider the legislative history of the challenged statute "as proof of its unconstitutionality" (page 36).

The Appellees do not in this brief specifically respond to the arguments in the Appellants' briefs which are directly based on the above misconceptions of what the District Court did. To do so would be to present and argue matters not before the Court in these appeals. A reading of the Opinion of the District Court will reveal a most painstaking analysis of the applicable principles. The same reading will thoroughly debunk the foregoing palpable misstatements of the words, reasoning and action of the District Court.

CONCLUSION

The Secretary states (Brief for the Secretary, Case No. 75-1495, page 42) that since the payment of the funds under the challenged statute has not yet occurred, "Congress has the power to alter its initial judgment." The decision of the District Court makes it possible for Congress

to do so with the history and status of the Kansas Delawares, as a claiming group, before it. If Congress desires to provide for a distribution of the challenged funds to tribal entities, it will do so. If Congress desires to statutorily define membership in existing tribal entities, it will do so. If Congress enacts a distribution statute so as to provide for distributions to lineal descendants on a per capita basis, it is only prohibited from invidiously discriminating between persons who stand on equal footing as to a claim to participate in such funds. This does not depart from long-established requirements of due process nor invade any plenary powers of Congress. The Appellees are not outside the protection of the Fifth Amendment just because they have some fractional Indian blood in their veins.

The Absentees suggest that, even though Congress may have erred and provided for the taking of property without just compensation, the courts are impotent to prevent a wrongful payment. They suggest that the Secretary should be permitted to pay these funds according to the terms of the challenged statute, even if wrong, and that the Kansas Delawares should pursue a right to payment in a Court of Claims action under the Tucker Act. The result of this procedure would be a double payment by the taxpayers to the extent of over a million dollars and a windfall to the two groups who misled Congress into the enactment of the challenged statute in its present form. In the case of the Absentees, this would also result in a payment of over two million dollars to a group whose ancestors were not with the tribe at the time of the wrong in 1854 and whose ancestors owned no share of the tribal

fund which was diminished by the wrong. In the case of the Cherokee Delawares, this group also claims a right to share in all benefits of the Indian Claims Commission awards to the Cherokee Nation and they thus seek to be Delawares where there are Delaware funds and Cherokees where there are Cherokee funds. (See Admissions No. 119, Request for Admissions, Volume IV of Record, p. 751.)

These are all matters which Congress will consider when it re-enacts a distribution statute. The challenged statute results in such a palpable and unjust scheme for the distribution of the Dockets 72 and 298 funds that the only solution is to affirm the judgment of the District Court so as to give Congress an opportunity to enact valid legislation for the benefit of all of the parties entitled to share.

Respectfully submitted,

DELMER L. STAGNER
STEPHEN P. FRIOT

Counsel for Appellees

of Counsel:

SPRADLING, STAGNER, ALPERN & FRIOT
Suite 700, Continental Savings Building
Oklahoma City, Oklahoma 73102

HENRY B. TALIAFERRO, JR.
CASEY, LANE & MITTENDORF
815 Connecticut Avenue N.W.
Washington, D.C. 20006

September, 1976

CERTIFICATE OF SERVICE

I, Delmer L. Stagner, a member of the bar of the United States District Court for the Western District of Oklahoma and a member of the bar of the Supreme Court of the United States, hereby certify that I did, on this ..... day of September, 1976, service three copies of the foregoing upon: Mr. B. J. Rothbaum, Jr., Tomerlin, High, Patton & Rothbaum, 323 Fidelity Plaza, Oklahoma City, Oklahoma 73102, counsel of record for the Absentee Delaware Tribe of Western Oklahoma, the Absentee Delaware class and the named individual members thereof; Mr. John G. Ghostbear, 340 Court Arcade Building, Tulsa, Oklahoma 74103, counsel of record for Dorothy Frazier and Ruth Rattler; Mr. Givens L. Adams, Assistant United States Attorney, United States Courthouse and Federal Building, Oklahoma City, Oklahoma 73102, counsel of record for Secretary of the Interior of the United States; Mr. Bruce Miller Townsend, 201 Denver Building, Seventh and Denver Streets, Tulsa, Oklahoma 74119, counsel of record for the Cherokee Delaware class and named individual members thereof; by placing the same in the United States mail first class postage fully prepaid; I further certify that I did, on this ..... day of September, 1976, serve three copies of the foregoing on Mr. Joseph S. Fontana, Winston and Strawn, Suite 1040, 1730 Pennsylvania Avenue N.W., Washington, D.C. 20006, counsel of record for the Cherokee Delaware class and named individual members thereof; Mr. Henry B. Taliaferro, Jr., Casey, Lane & Mittendorf, 815 Connecticut Avenue N.W., Washington, D.C. 20006, counsel of record for Wanda June Weeks; and Mr. Duard Barnes, Associate Solicitor, Office of the Solicitor, United States Department of the Interior, Washington, D.C. 20420, counsel of record for the Secretary of the Interior of the United States, by placing three copies of the same in the United States mail, airmail postage fully prepaid; I further certify that I did, on this ..... day of September, 1976, in

conformity with 80 Stat. 613, 28 U.S.C. § 518, serve three true and correct copies of the foregoing upon the Solicitor General, Office of the Solicitor General, Department of Justice, Washington, D.C. 20530, by placing the same in the United States mail, airmail postage fully prepaid; and I further certify that all parties required to be served have been served.

_____

Delmer L. Stagner